Supreme Court, U.S.
FILED

96 134 JUN 3 1996

No. OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term 1995

Bernard Giffler,

Petitioner,

v.

Gene P Abel, N Robert Laws, Jaqueline Wolchko, John M Toth, Charled D Baker, Donna Faunce, Patricia A Cheney, Carl F Haeusssler, Geryl d McMullin, Eric M Raffle, Elizabeth A Yonson,

Respondents.

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

* * *

Bernard Giffler (Pro se)
34 Linda Lane
Warrington PA 18976
215/343-0194

30 pp

QUESTION PRESENTED FOR REVIEW

Did the U.S. District Court err in granting respondents a summary dismissal on the merits of subject case when there remain substantial issues of material fact? To be more specific, did the U.S. District Court err in granting respondents' MOTION FOR SUMMARY JUDGMENT in the face of petitioner's objections that respondents' 'facts of subject litigation' were grossly falsified to make the petitioner out to be an uncaring person who was inundating his school administration's fax machine with his faxed messages so the Administration could not use their fax machine for the alleged more important business for which Mr Abel, presumably speaking for the Administration, says it had been purchased.

And also in the face of petitioner's objection that lying representations in respondents' MOTION FOR SUMMARY JUDGMENT may have prejudiced the District Court to wrongly interpret precedent cases so it could argue in its OPINION that the veracity of respondents' 'facts of subject litigation' were immaterial - despite the evidence in the District Court's OPINION that it clearly believed respondents' version of the contested facts was the correct version - without having seen the petitioner or given him any opportunity to question respondents and others with respect to the veracity of respondents' alleged facts. And also in the face of petitioner's objection that two important precedents in the District Court's OPINION were wrongly construed: namely, PERRY EDUC. ASS'N v. PERRY LOCAL EDUC. ASS'N, 460 U.S. 37, 45 (1983) and DESTINATION VENTURES, LTD. v. FCC, 46 F.3d 54 (9th Cir. 1995).

LIST OF PARTIES

Petitioner, Bernard Giffler, is a resident of the Central Bucks School District in Bucks County, PA. He is 74 plus years of age and currently retired. He has an earned doctoral degree in Engineering Science [Columbia University, 1959], and has worked exclusively on computers and their applications for leading computer manufacturers and users, beginning in 1950.

Respondents are officials of the Central Bucks School District. Gene P Abel is the district's business administrator. N Robert Laws is the school district's superintendent and the person to whom Gene Abel reports.

The remaining respondents are the elected members of the district's school board in 1994. [Messrs Abel and Laws and certain other school administrators are also unelected (and thus non-voting) members of that Board.]

TABLE OF CONTENTS

	PAGE
Question Presented for Review	i
List of Parties	ii
Table of Contents	iii
Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
Reason for Granting The Writ This writ must be granted because the District Court abused its discretion by granting summary judgment on the merits of subject case when there remain genuine issues of material fact	3 3
Conclusions	9
APPENDIX: ORDER OF U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITIONER'S REQUEST FOR A RE-HEARING [JAN 4 1996] . .	A-1
ORDER OF THE U.S. COURT OF APPEALS AFFIRMING THE ORDER OF THE DISTRICT COURT	A-2
ORDER AND MEMORANDUM OF U.S. DISTRICT COURT	A-3
EXTENSION OF TIME TO FILE FOR CERTIORARI	A-16

OPINIONS BELOW

The orders of the U.S. Court of Appeals and the order and opinion of the U.S. District Court are reproduced in the Appendix, beginning at Page A-1.

JURISDICTION

This Court's jurisdiction is invoked pursuant to the fact that all charges in petitioner's civil action in U.S. District Court were dismissed on summary judgment, that petitioner's appeal in the U.S. Court of Appeals for the Third Circuit was similarly dismissed when that Court affirmed the lower court's ruling, and the fact that the Appeals Court did then deny petitioner's request for a rehearing by the Appeals Court en banc on January 4 1996.

This petition is filed within 90 days of the U.S. Court of Appeals' denial of petitioner's request for a rehearing en banc, and an additional 60-day extension by Justice Souter.

Copies of this petition have been sent to Pennsylvania's Attorney General as required by U.S. Supreme Court Rule 29.4(c).

STATUTES INVOLVED

U.S. Constitution: First Amendment on freedom of speech.

U.S. Constitution: Fifth and Fourteenth Amendments on due process.

STATEMENT OF THE CASE

Petitioner brought a civil action against respondents, charging them with directing Gene Abel [or giving him unchecked authority] to direct subject parties' telephone company [Bell Atlantic] to permanently call-block petitioner's phone lines which he had been using for some months to fax his views and opinions to his school board and administration, mainly views and opinions on matters relevant to the regular business of that board and administration.

After about 5 or more months of this, Mr Abel did 'in passing' complain [very falsely in petitioner's view] that petitioner's faxes were disrupting the smooth operation of the administration, that they would, for example, seize the Administration's fax machine for long periods during which the Administration could not use it for presumably more important other business for which it had been exclusively purchased and [quoting Mr Abel] to which it had been duly 'dedicated'.

Gene Abel did subsequently warn petitioner in a letter dated June 30 1994 that his phone lines will be permanently call-blocked if he sends a single fax on any subject to [or via] the school administration's fax machine during the administration's business hours.

Gene Abel did then phone petitioner the next morning [July 1, 1994] before the just-cited letter had even been received, to advise him that he had sent the administration two faxes that very morning and that he was now going to be permanently call-blocked.

Petitioner apologized, saying they were sent by mistake. He apologized because he had informally agreed to honor Abel's demands until such time as he could get a court of law to decide if the Administration can legally dictate when he can and cannot send a fax to or via the administration's fax machine, on pain of being call-blocked if he did not comply.

The cited call-blocking, the Court should know, is a service-for-fee of our telephone company [Bell Atlantic] that will let ANY Pennsylvania telephone subscriber direct Bell Atlantic to call-block ALL incoming calls [telephone or fax] from the phone lines of ANY other Pennsylvania subscriber.

When petitioner was call-blocked, he received no official notice from Bell Atlantic that he was or would be call-blocked. What did happen is that Bell Atlantic would intercept his calls [telephoned or faxed] to the Administration in a switching center and would send the petitioner back a false canned message that the party he called "is not taking calls at this time". A more correct message would have said that his 'call is not being forwarded because the called party has call-blocked the telephone used to make this call'.

Bell Atlantic's service, the Court should know, does not [and presumably can not] currently call-block fax calls without also blocking ordinary voice calls, and vice versa.

The facts are that any Pennsylvanian can call-block any other Pennsylvanian. The blocking party does not need to have a reason. Nor do the blocked lines have to have previously been used to call the blocker, or to be the lines of a person who knows his blocker or

who might have an imagined reason to call him. Nor will the blocking party be told who [i.e. which blocked telephone line] was intercepted on the blocking party's behalf, and when.

Petitioner believes and had complained that the state law that supports this service-for-fee of the telephone company is obviously unconstitutional because it illegally infringes the call-blocked parties' first-amendment right of free speech and their fifth and fourteenth amendment right to due process.

Petitioner did not make the preceding claim explicit in his subject civil action because, being a non-lawyer, he did not know how to do it. He has, however, since made this claim to the PA PUC and is currently bringing a civil action on this issue against Bell Atlantic in the PUC's administrative law court and will, if necessary, move his complaint to the U.S. District Court.

Petitioner would further advise this court that he had been trying to persuade Gene Abel and other parties on his [the petitioner's] faxlist that respondents do not have absolute authority to prescribe who can call or fax whom in a public telecommunications system because the regulation of these systems is typically delegated to authorized regulatory agencies which the school administration is NOT.

Petitioner had also told the School Board and Administration in his faxletters that he was [and still is] willing to self-regulate the sending of his faxes so they would hardly ever conflict with the Administration's use of its fax machine - provided the regulations are reasonable [i.e. mutually acceptable] or court-imposed and that respondents could not threaten

to call-block petitioner's phone lines on their own authority if he did not comply with the administration's dictatorial regulations and its own unsupervised private determinations of how, when and where its regulations were [or might have been] violated.

See, for example, Gene Abel's above-cited letter in Abel's affidavit in DEFENDANTS' MOTION FOR SUMMARY JUDGMENT for other of Abel's viws of the legalities of subject litigation and the abuse that [Abel says] petitioner has inflicted on him - views that are quite different from the account in the main body of Abel's affidavit and in respondents' MOTION itself - particularly Abel's unwillingness in his letter to discuss and resolve subject dispute so that petitioner HAD TO TAKE HIS CASE TO THE U.S. DISTRICT COURT. Petitioner would also direct this Court to the following quotes in Abel's above-cited letter: e.g. "If ... you again fax [any] material during the work day, your [telephone] lines will be PERMANENTLY blocked" and "your [petitioner's] contention that the blocking is illegal does not hold water ... and until such time as either the courts or the legislature has made call-blocking illegal, it is legal" and his closing statement that "this is the last time that I intend to deal with this issue".

And Gene Abel did then call-block petitioner's lines on the morning of July 1 [before his letter had even been received] because [Abel said] the Administration received two faxes from the petitioner that very morning. [Note that Abel did later say in his affidavit that petitioer sent 8 faxes the next day - an allegation the petitioner called a blatant lie [one of many] in his REPLY TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and subsequent Brief to the Appeals Court.

Petitioner did subsequently check his fax machine's log to find the faxes which were two. Each was a one page statement that was addressed to a different member of the Board. Each took one minute to transmit after which petitioner's fax machine will normally hang up and wait several minutes before attempting to send a next fax - even to the same fax machine.

Petitioner found they were sent approximately 8:15 AM by accident in that he had thought they would have been received well before the start of the Administration's business hours. He also discovered the Administration's fax machine was not in use when petitioner's messages arrived. That is, petitioner discovered that his modem had to wake-up the Administration's modem.

Petitioner is giving this court this material to contrast with what Gene Abel said in his false version of the facts [in his affidvit in DEFENDANTS' MOTION FOR SUMMARY JUDGMENT], and to emphasize petitioner's claim that Mr Abel's affidavit did not tell thc District Court the whole truth and that his false and misleading statements were made to prejudice the District Court and to incite it to grant respondents' subject MOTION FOR SUMMARY JUDGMENT.

Also note that the Court's decision made it possible for it to declare the contested versions of the facts to be immaterial and to grant respondents' MOTION as a matter of law and to even declare that IT IS THE COURT'S OPINION THAT THE SCHOOL ADMINISTRATION COULD REFUSE TO ACCEPT PETITIONER'S FAXES AT ANY TIME FOR ANY OR NO REASON, that is, that the Administration could treat its fax machine the same as an ordinary office machine [e.g. a pencil sharpener that it could let some persons use - and others, not].

Petitioner subsequently took his case to the U.S. Court of Appeals which affirmed the lower court's order granting summary judgment to respondents on all counts WITHOUT AN ACCOMPANYING OPINION.

When petitioner's request for a rehearing by the entire U.S. Court of Appeals was denied, he then decided to take his case to the Supreme Court.

REASON FOR GRANTING THE WRIT

Certiorari should be granted to review the decision of the District Court and the Court of Appeals because petitioner was denied his day in court which would have given him more opportunity to contest respondents' false statements of the facts of subject case which did most wrongly depict petitioner as an unreasonable trouble-making person who wanted to disrupt the smooth operation of the Administration.

Petitioner believes he could easily have dispelled respondents' demeaning characterization of petitioner's reasonably decent behavior, and the risk that their slurs could have prejudiced the district court to find one way or another to stop petitioner's alleged abuse of his school board and administration - when the facts are that the truly abused party is [and was] the petitioner.

Petitioner further believes the District Court also erred in deciding PERRY v. PERRT supported respondents' position that their fax machine is not a public forum, particularly when it denied petitioner any opportunity to present his analysis of what PERRY did and did not say in a trial or oral argument.

Petitioner further believes the District Court erred when it used the fact that there was just one precedent [DESTINATION VENTURES LTD. v. FCC, 46 F. 3d 54 (9th Cir. 1995] involving persons' first-amendment right to fax unsolicited messages to substantiate its conclusion that fax technology is new and untried with respect to the determination of a fax machine's status as a public forum.

That is, petitioner believes a trial would have produced evidence that could have thwarted the District Court's conclusion that fax technology is so new and different that it would be resolving the issue of the status of unsolicited faxed communications for the first time and that it could do it without giving petitioner a day in court in which he and witnesses could have demonstrated that fax technology is or has become an integral part of telephone technology so that, for example, one cannot currently block fax calls on telephone lines [which is how they are transmitted] without also blocking all ordinary voice calls on those same lines because these calls are intermixed and separated only by their senders' and receivers' privately owned or leased terminals.

Petitioner would thus argue that the District Court did create an improper precedent that nullified a ruling of the FCC that is binding on the transmission of faxed and telephoned communications between states. That is, it created a precedent that can now be used to subject telephoned [fax or voice] intra-state communications to a restriction [namely, the right of any telephone subcriber to authorize his telephone company to block incoming calls from specified intra-state telephone lines for any or no reason] - a restriction which is not applicable when the parties reside in different states.

CONCLUSIONS

Petitioner would request that the Supreme Court terminate the Central Bucks Administration and Board's harassment of petitioner's use of his telephone line to transmit his views with respect to the deliberations of his school Administration and Board by fax machines that are regularly used to send/receive faxed communications to/from these persons.

He would further suggest that recipients, who may truly be harassed by faxed communications, be urged to find a non-coercive solution to their problem - or, failing that, that the harassed party charge his alleged harasser with criminal 'harassment by communication' or that he seek relief by bringing a civil action against his alleged harasser. [Petitioner would further request that the Supreme Court give all persons the right to send unsolicited faxed communications to anyone who can receive them, subject only to reasonable restrictions that the senders not use their first-amendment right of free speech to harrass their messages' intended recipients.

Petitioner would further remind this Court that subject District Court wrote in its OPINION that it was the opinion of the 9th Circuit Court, that heard DESTINATION VENTURES v. FCC, that the FCC's ban was upheld because it satisfied the "reasonable fit requirement the First Amendment imposes on [the] regulation of commercial speech." It did not, in short, deny that the advertiser had a first-amendment right to fax its unsolicited messages which was the unprecedented decision of the District and Appeals Courts in subject litigation in which petitioner was trying to do no more than disseminate his and other similarly minded persons' views of

what their school board and administration should [and *should not*] be doing.

And he would now, the District Court having said that, ask the Supreme Court to note that his District Court did then state that there was no constitutional hindrance if subject school board and administration should deny petitioner the right to fax ANYTHING EVER to his school board and administration.

Petitioner would thus request that the District Court's summary dismissal of his case be vacated and petitioner's original civil complaint be reconsidered on its merits, and that the Supreme Court decide the basic issue of whether a fax machine with a telephone number in a public telecommunications system is or is not a public forum.

Respectfully submitted,

by:

Bernard Giffler {pro se)
34 Linda Lane
Warrington PA 18976
215/343-0194

Dated May 31 1996

APPENDIX TO PETITION FOR CERTIORARI

***

Judgment Order

(U.S. Court of Appeals - Third Circuit)

(Issued Jamuary 4 1996)

Bernard Giffler, Appellant v. Gene P Abel, N Robert Laws, Jaqueline Wolchko, John M Toth, Charles D Baker, Patricia A Cheney, Donna L Faunce, Carl F Haeussler, Geryl D McMullin, Eric N Raffle, Elizabeth A Yonson

SUR PETITION FOR REHEARING

BEFORE SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAAD, ALITO, ROTH, LEWIS, McKEE, and SAROKIN, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the court.

Dated: Jan 4 1996

Judgment Order

(U.S. Court of Appeals - Third Circuit)

(Issued November 15 1995)

Bernard Giffler, Appellant v. Gene P Abel, N Robert Laws, Jaqueline Wolchko, John M Toth, Charles D Baker, Patricia A Cheney, Donna L Faunce, Carl F Haeussler, Geryl D McMullin, Eric N Raffle, Elizabeth A Yonson

***

On Appeal from the U.S. District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 94-cv-05348)

***

Submitted October 16 1995

BEFORE: STAPLETON, NYGAARD and LEWIS, Circuit Judges

***

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court entered May 8 1995, be and is hereby affirmed. Costs taxed against appellant.

Dated: November 15 1995

ORDER AND MEMORANDUM GRANTING DEFENDANTS'

MAY 8 1995 MOTION FOR SUMMARY JUDGMENT

(U.S. District Court for the Eastern District of Pennsylvania)

(Entered May 8 1995)

Bernard Giffler, Appellant v. Gene P Abel, N Robert Laws, Jaqueline Wolchko, John M Toth, Charles D Baker, Patricia A Cheney, Donna L Faunce, Carl F Haeussler, Geryl D McMullin, Eric N Raffle, Elizabeth A Yonson

***

(Docket Number 94-cv-05348)

Submitted April 13 1995

BEFORE: VANARTSDALEN, Judge of District Court

***

MEMORANDUM AND ORDER

Plaintiff Bernard Giffler (Giffler) filed this action against school district officials of the Central Bucks school district (District) specifically naming the business administrator, the superintendent of schools, and the nine members of the Central Bucks school district Board of Directors (Board), including the president and vice-president of the Board. The District and the Board are not named as defendant, and the defendants are not named in their official capacities.

Nevertheless, plaintiff seeks mandatory injunctive relief and damages against both the District and the Board for alleged violations of his right of free speech and to due process.

Giffler claims the defendants violated his First Amendment right of free speech and his right to due process by ordering that a "call block" be placed on the single facsimile {fax) machine utilized in the District administrative office. The call block feature prevented facsimile messages sent from plaintiff's listed telephone fax number from being received by the District's fax machine. No other telephone number had a call block placed on it by the District. All defendants have moved for summary judgment, contending there is no First Amendment or other right that would require the District's fax machine to remain available to receive faxed telephone messages from plaintiff's private telephone[1]. Defendants also contend that plaintiff has no due process right to a hearing or judicial determination prior to the District initiating the call block. I agree. The motion for summary judgment will be granted.

I. FACTUAL BACKGROUND

Throughout early 1994 defendant Gene Abel, business

---

1. Plaintiff Giffler timely filed a response to the motion for summary judgment. Although this response does not contain any affidavit to counter those submitted by defendants in support of the summary judgment motion, because plaintiff is a 'pro se' litigant, I will consider the information set forth in plaintiff's response to be in the nature of an affidavit.

administrator for the District, warned plaintiff Giffler that Giffler had been sending an excessive number of faxes to the District's administrative office fax machine, interrupting its use for administrative business[2]. Giffler failed to heed Abel's warnings and continued sending faxes. In June of 1994, Abel notified Giffler in writing that if Giffler continued to send faxes during the administrative office's business business hours[3], the District would "call block" faxes[4] originating from the telephone listed in his name. The day after Abel sent this letter, Giffler sent the District faxes after 8:00 a.m. [5]. [Cont'd]

---

2. According to the District, Giffler's fax activity in early 1994 was as follows: 106 transmissions in January; 85 in February, 207 in March; 147 in April; 324 in May; and 128 in June. At his deposition, Giffler estimated that the transmissions averaged two pages each.

Giffler's faxes were often in the form of a "newsletter" which he sent to certain District administrators and teachers, as well as to others. This newsletter presented plaintiff's views about issues confronting the District and contained "exposes" of District actions.

3. The District business hours are from 8:00 a.m. to 5:00 p.m.

4. The call block feature prevents calls originating from a particular telephone number from going through to the number of the party ordering the block.

5. There is some dispute as to the number of transmissions Giffler sent the day after Abel sent his letter. The District says Giffler sent eight [Cont'd]

[Cont'd] The District subsequently ordered the call block, which prevented Giffler from making any fax transmission to the District from Giffler's personal fax machine [6].

The block remained in place until mid-August, 1994, when Giffler signed, under protest, a written agreement that he would not send faxes to the District during business hours. The District subsequently lifted the call block. Since the District lifted the block, Giffler has abided by the terms of the agreement, restricting his fax transmission to the District to non-business hours. The District reports, and Giffler does not dispute, that it continues to receive faxes from Giffler, regardless of subject matter, so long as they are not sent during business hours.

---

5. [cont'd] transmissions. At his deposition and in his response to defendants' motion for summary judgment, Giffler says he sent two transmissions. Giffler protests that he had not yet received Abel's warning letter when he sent the offending faxes. Giffler admits, however, that he understood the general terms of the warning contained in the letter from discussions with Abel that took place prior to the date of the letter. Plaintiff says he thought the school day began at 8:30 a.m. rather than 8:00 a.m.

6. The block did not prevent all faxes from Giffler, but merely those originating from his own fax machine. Giffler testified at his deposition to sending faxes to the District from other fax machines during the time the call block was in place, as well as to hand-delivering messages during this time.

II. PROCEDURAL HISTORY

Plaintiff filed the complaint in this action on August 29, 1994. In response, the defendants filed a motion for a more definite statement pursuant to Federal Rule of Civil Procedure 12. By Memorandum and Order of December 19, 1994, I granted defendants' motion in part and gave plaintiff leave to file an amended complaint clarifying any due process claim he sought to assert. In response, plaintiff filed an amended complaint claiming that the defendants had violated his due process rights by "their failure to bring a police action or to seek a court order that woud force plaintiff to cease and desist from violating the defendant's [sic] conditions for accessing their faxline" and "their refusal [ ] to submit plaintiff's case and argument [ ] to an adjudicative agency of government that would have jurisdiction to resolve the parties conflicting viewpoints." (Plaintiff Amended Complaint). The defendants then filed the instant motion for summary judgment.

III. THE SUMMARY JUDGMENT STANDARD

A motion for summary judgment is appropriate only when there is no genuine issue of material fact, and one party is entitled to judgment as a matter of law. WILLIAMS v. BOROUGH OF WEST CHESTER, 891, F.2d 458, 463-4 {3d Cir. 1989). In a motion for summary judgment, the court may examine evidence beyond the pleadings. The court must always consider the evidence, and the inferences from it, in the light most favorable to the non-moving party. UNITED STATES v. DIEBOLD, INC., 369 U.S. 654, 655 {1962); TIGG CORP. v. DOW CORNING CORP.,

822 F.2d 358, 361, (3 Cir. 1987); BAKER v. LUKENS STEEL CO., 793 F.2d 509 511 (3d cir. 1986). If a conflict arises between the evidence presented by both sides, the court must always accept as true the allegations of the non-moving party. ANDERSON v.LIBERTY LOBBY, INC., 477 U.S. 242, 255 (1986). For a dispute to be "genuine", a reasonable fact finder must be able to return a verdict (or render a decision) in favor of the non-moving party. ANDERSON, 477 U.S. at 248.

I find that there is no dispute as to any material fact in this matter. Summary judgment is available to the defendants if they are entitled to judgment as a matter of law.

IV. DISCUSSION

A. Plaintiff's First Amendment Claim

Plaintiff Giffler argues that the time restriction that the District has placed on his sending fax transmissions violates his First Amendment free speech rights. He claims that any restriction on his ability to send faxes to the District would be a violation if that restriction is imposed on him alone. In response, the defendants argue that the District's administrative office fax machine is not a public forum and its use, and the messages which it is programmed to receive, may be regulated, limited and controlled in any reasonable manner and without providing any prior notice.

---

7. Research produced one case, DESTINATION VENTURES, LTD. v. FCC, 46 F.3d 54 (9th cir. 1995), involving First Amendment rights and fax technology. [cont'd]

The question of First Amendment rights in the use of fax technology appears to have been seldom considered by the federal courts[7]. Although fax machine usage has not been extensively considered, the law of free speech rights and public property is well established.

The Supreme Court has created three classes of publicly held property for First Amendment purposes: public forums, designated public forums, and non-public forums. INT'L SOC'Y FOR KRISHNA CONSCIOUSNESS v. LEE,112 S. Ct. 2701, 2705 (1992). The fax machine is clearly not a public forum. The fax machine is not a place "which by long tradition or by government fiat ha[s] been devoted to assembly and debate." PERRY EDUC. ASS'N, 460 U.S. 37, 45 (1983).[8]

Nor is the fax machine a designated public forum. As defined by the Supreme Court in LEE, a designated public forum is public property that is not a traditional public forum but that "the state has opened for use by part or all of the public" as a place for expressive activity. LEE, at 2705. Attempts to regulate speech in a designated public forum are subject to the same limitations as are regulations of speech in traditional public fora. ID. To create a designa--

---

7. [cont'd] In this case the United States Court of Appeals for the ninth Circuit held that an FCC regulation banning unsolicited advertisements from being sent by fax satisfied the "reasonable fit" requirement the First Amendment imposes on [the] regulation of commercial speech. Id. at 55-56.

8. Examples of public fora include streets [cont'd]

ted public forum, the state must act intentionally. CORNELIUS v. NAACP LEGAL DEFENSE AND EDUC. FUND, 473 U.S. 788, 802, (1985).

The District argues strenuously that the fax machine in question is for business use only during business hours. Defendants indicate and Giffler does not dispute, that apart from Giffler's faxes all faxes sent or received on the fax machine at the [Central Bucks] school district administrative offices are related to the day-to-day business of the District. The District can not be said to have intentionally designated the fax machine as a place for expressive activity[9].

Because the fax machine is not a public forum or a designated public forum, it is a non-public forum. A non-public forum is subject to reasonable regula-

---

8. [cont'd] and parks. PERRY, at 45. Giffler argues that the application of the three tier forum analysis to fax machines is absurd. It is clear, however, that the right of access is a form of communication and that forum analysis is appropriate. SEE PERRY. at 44 {applying the three tier analysis to a school internal mail system).

9. In PERRY, the Supreme Court faced facts quite analogous to those in the instant dispute. There, the Court held that allowing some non-business use of a school's internal mail system did not create a limited public forum. PERRY, at 47-48. "When government property is not dedicated to open communication, the government may [ ] restrict use to those who participate in the forum's official business." ID, at 53.

tion so long as the regulation is not content-based; that is, so long as the regulation is not used to suppress one speaker's views due to disagreement with their content. LEE, 112 S. Ct. at 2705-06.

Giffler claims that the District imposed the call block and restrictions because of the content of his fax transmissions. According to plaintiff Giffler, his faxes accused District officials of improper behavior in connection with their school board offices and challenged the District's positions on several issues. The uncontroverted evidence, however, is that the District has not refused to accept Giffler's faxes based on the message or content of the transmission. It is indisputed that the District accepted and continues to accept all of plaintiff's faxes - regardless of the nature of their content- sent during non-business hours.

While it is true that Giffler is the only person subject to the hour restrictions and the only person whose fax line was call blocked, he is also the only person who sends non-day-to-day business related faxes to the District administrative office fax machine. So long as the District treats equally all transmissions of a similar nature, there can be no content based restriction of free speech. Faxes sent in the course of day-to-day business to a fax machine designated for business use simply can not be equated with indiscriminate non-business faxes.

The hour restriction currently imposed on Giffler is reasonable[10]. The restriction allows Giffler [Cont'd]

---

10. It should be noted that the District could choose to deny all non-day-to-day business related fax trans-

ample opportunity to send faxes to the District during hours other than business hours. The time restriction imposed on Giffler by the District amounts to no more than an inconvenience to Giffler. Even when the call block was in place, Giffler had multiple alternative means of sending communications to the District, including U.S. Mail, personal hand delivery, and even faxing the District from any phone line other than his own. Giffler's own deposition testimony reveals that he has taken advantage of at least some of these alternatives from time to time.

---

10. [Cont'd] missions, regardless of when they are sent. The government does not have an obligation to purchase a fax machine and supply it with paper to provide the public a forum in which to promote political or other agendas. Any non-public use the District allows for a business-only fax machine is purely discretionary, subject only to the limit that the District not allow and deny use on the basis of its agreement or disagreement with the message contained in the transmissions.

In the DESTINATION VENTURES case, the Ninth Circuit pointed out that allowing use of a fax machine involves some cost to the recipient of the faxes, for the recipient must pay for the paper on which the message is printed. DESTINATION VENTURES LTD. v. FCC, 46 F.2d 54, 56 (9th Cir. 1995).

Giffler suggests that the District should purchase additional fax machines if his messages are interrupting the business of the District. Clearly there is no First Amendment or other constitutional requirement that a school district purchase and maintain fax machines so that members of the public may send communications to the district by fax instead of by mail or hand delivery or some other method.

I find that the District has not intentionally opened their administrative office fax machine to public discourse. The hour use restriction imposed by the District on Giffler's use of the fax machine is reasonable and is not content-based. The call block imposed by the District on plaintiff Giffler's faxes was reasonable as well. The call block allowed Giffler many alternative means to send communications to the District. Summary Judgment will be granted for the defendants and against plaintiff on Plaintiff's First Amendment claim [11].

B. Plaintiff's Due Process Claim

In his due process claim, Giffler argues that his due process rights were violated when the District instituted the call-block without placing the matter before a court or administrative tribunal. Plaintiff Giffler misconstrues the requirements procedural due process imposes on the state.

The Constitution dictates that no person shall be deprived of life, liberty, or property without due process of law. A life, liberty, or property interest must be implicated before the guarantee of procedural due process attaches. Property interests protected by procedural due process are determined by state law. SEE, E.G. BOARD OF REGENTS v. ROTH, 408 U.S. 564, 576-78 (1972).

---

11. Although the question is not presently before me, I add, by way of clarification, that I see no constitutional prohibition against the District imposing a total call block for all hours against messages emanating from Giffler's telephone fax machine.

Plaintiff Giffler's claim does not involve life or liberty interests, nor does Giffler have a property interest in being able to send faxes to the fax machine in the District's administrative office. The machine is used by the District exclusively for business purposes (with the exception of receiving Giffler's faxes). The state can deny public access to a non-public forum such as the fax machine, thereby excluding anyone not involved in official business, so long as the exclusion is not based on whether the state agrees with the content of the message.

Summary judgment will be granted in favor of defendants and against plaintiff Giffler on plaintiff's due process claim.

C. Qualified Immunity

Plaintiff Giffler names as defendants and brings this action only against individuals. The Supreme Court has made clear that government officials who perform discretionary functions related to their positions are shielded from liability for civil damages so long as their conduct does not violate clearly established constitutional or statutory rights. HARLOW v. FITZGERALD, 457 U.S. 800, 818 (1982).

As administrators and officials for the District, the defendants must exercise discretion to ensure that school business is carried out as smoothly and efficiently as possible. Imposing the call block and hour use restrictions was within the scope of the defendants' responsibilities and discretion. Defendants did not violate any of Plaintiff Giffler's

clearly established constitutional or statutory rights by imposing the call block or the hour use restriction. The defendants enjoy qualified immunity from plaintiff Giffler's claims. An appropriate order follows.

ORDER

Upon consideration of the defendants' motion for summary judgment and plaintiff Bernard Giffler's response thereto, for the reasons set forth in the accompanying memorandum it is ORDERED that summary judgment is GRANTED for defendants and against plaintiff.

Judgment is entered in favor of all the named defendants and against the plaintiff, Bernard Giffler, on all claims asserted in plaintiff's complaint and amended complaint.

BY THE COURT:

May 4 1995 Donald W. VanArtsdalen. S.J.

ADVISORY LETTER FROM WILLIAM K SUTER

Office of the Clerk of the U.S. Supreme Court,

dated April 1, 19996

RE: Bernard Giffler v. Gene P Abel, et al. Application No. A-809

Dear Mr Giffler:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter who, on April 1, 1996, extended the time to and including June 2, 1996.

BY: William K Suter, Clerk

NOTIFICATION LIST

Mr Bernard Giffler
34 Linda Lane
Warrington, PA 18976

Mr Jeffrey H Quinn
Curtis Center, Suite 1150
Indeprendence Square West
Philadelphia, PA 19106

P. Douglas Sisk
United States Court of Appeals for the Third Circuit
601 Market Street
Room 21400
Phlladelphia, PA 19106